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**UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION**

In re

MARIO CARDONA,
Debtor.

DANIEL GARZA

Plaintiff

vs.

MARIO G. CARDONA

Defendant

Case No: 2:17-bk-22804-WB

Adversary No.: 2:18-ap-01381-WB

Before the Honorable Julia W. Brand

Chapter 7

**PLAINTIFF'S REPLY TO DEFENDANT'S
OPPOSITION TO PLAINTIFF'S
SUPPLEMENTAL BRIEF IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT;
DECLARATION OF KAVEH NAVAB**

Date: April 28, 2020

Time: 2:00 pm

Courtroom: 1375

Place: 255 E. Temple St, Los Angeles

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Defendant's opposition to Plaintiff's Supplemental Brief is completely void of any facts and ignores this Court's specific instruction to provide a full record from the underlying United States District Court ("USDC") trial, verdict and finding of malice in favor of Plaintiff. Rather than face the fact that Defendant acted with actual malice—a determination the unanimous USDC jury reached after hearing extensive testimony and overwhelming evidence against Defendant—Defendant deflects and resorts to misstating that Plaintiff Garza argued that Cardona did not act with malice in the USDC. Nothing could be further from the truth. Indeed, Plaintiff's counsel was not permitted to argue on the malice question before the Court, as the Court determined that only the City and Defendant Cardona could argue malice before the jury. (Tr. 6/23 122:15-123:7). Defendants can point to no testimony or argument from the USDC trial in which Plaintiff argued that Cardona did not act with malice because such a thing never happened.

The definition of malice presented to the USDC jury is consistent with the definition in bankruptcy statutes and Defendant's stating that they are different does not make it so. The malice definition provided to the USDC jury informed them that they had to find Cardona acted with intent to injure or willfully disregarded Garza's rights or safety. Thus, the jury found that Garza's damages were the result of a willful and malicious injury caused by Cardona. As demonstrated in Plaintiff's supplemental brief, the evidence presented at trial allowed the jury to fully evaluate the evidence, reaching a unanimous finding that Cardona acted willfully and with malice when he assaulted Plaintiff and used excessive force. There was a fully litigated jury trial on the exact same issue which is before this Court. It would be error to allow for retrial on the identical issue of whether Cardona acted maliciously when he violated Mr. Garza's constitutional rights by using excessive force. There is simply no rationale to retry this issue again in front of the bankruptcy Court. The fact that the jury was told not to consider Cardona's subjective intent in the first phase of trial is completely immaterial to the second phase malice trial where it had to find Cardona acted willfully in injuring Garza and this is enough for a finding of malice under § 1328(a)(4).

1 **II. ARGUMENT**

2 **A. JURY TRIAL**

3 Defendant admits “the malice finding on its surface would appear to be enough for
4 Plaintiff to prevail in this MSJ” and then points to nothing in the record which undermines that
5 conclusion. Defendant fails point to anything in Cardona’s Declaration which the jury did not
6 consider in its determination of malice that would have made any difference. Defendants reliance
7 on the letter from Chief Beck’s office is inapplicable as that is hearsay, and at trial Cardona had
8 every opportunity to cross examine the LAPD Commander who did testify at trial and could have,
9 but did not, subpoena or call as a witness anyone involved in the investigation to testify why it
10 reached the conclusion that his conduct was lawful, justified or proper. Cardona never did.

11 Additionally, Defendant’s reference to the Plaintiff’s appeal is inapplicable as that is
12 regarding Plaintiff’s separate *Monell* trial against the City of Los Angeles for ratification, which
13 Defendant had no part in, and was strictly between the City of Los Angeles and Plaintiff. Again,
14 Defendant’s opposition is devoid of any testimony given at trial and fails to address the Court’s
15 request that a full record be provided. Defendant Cardona simply never shows why or how the
16 use of force investigation or report would have resulted in a different conclusion or that the trial
17 judge erred in not admitting materials from the investigation. Cardona never appealed that
18 decision and the fact that Garza is appealing the verdict of the second trial where relevant evidence
19 was excluded to show then Chief Beck ratified Cardona’s misconduct, this has nothing to do with
20 the underlying liability trial and malice finding against Cardona.

21 Defendant can point to no evidence or testimony that he did not act with malice. The
22 trial testimony from eyewitnesses, video, Sheriff’s report, arguments, jury verdict and findings
23 all point to one conclusion—Defendants acted with malice when he willfully, intentionally and
24 maliciously caused injury to Plaintiff.

25 **B. DEFINITION OF MALICE**

26 Defendant admits that, “[t]he elements of willful injury in bankruptcy (9th Circuit) can
27 only be found if the debtor **subjectively intends** to injure the creditor, or subjectively believes
28 that harm is substantially certain to occur. [emphasis added]” [Opp brief at 5:14-16], but never

1 explains how any other conclusion can be reached based on Cardona's conduct in repeatedly
2 battering Garza and twisting his wrists with a painful wrist lock when Garza was helplessly
3 handcuffed and laying prone on the ground with Cardona straddling him. Defendants continue to
4 argue that because subjective intent is not required for proving excessive force this Court cannot
5 grant the MSJ, however, the fact that the jury was told not to consider Cardona's subjective intent
6 in the first phase of trial is completely immaterial to the second phase malice trial where it had to
7 find Cardona acted willfully in injuring Garza and this is enough for a finding of malice under §
8 1328(a)(4).

9 There is a reason the trial was split into different phases and a separate instruction was
10 given during the second phase where the jury found that Cardona acted with malice. While the
11 instruction for excessive force correctly instructed the jury not to consider subjective intent, the
12 malice instruction the Court gave provided that: "Malice" means that Defendant Mario Cardona
13 acted with **intent to cause injury** or that his **conduct was despicable** and was done with a **willful**
14 **and knowing disregard of the rights or safety of another**. A person acts with knowing
15 disregard when he or she is **aware of the probable dangerous consequences of his or her**
16 **conduct** and deliberately fails to avoid those consequences." (emphasis added). Although
17 Defendant argues that the instruction is disjunctive and therefore inconclusive, both clauses
18 require a wrongful act done with an intentional mindset. Defendants disingenuously twist the case
19 law when they say 'despicable conduct with conscience [sic] disregard of the rights of others is
20 not enough.' [Opp brief at 5:18-28]. This isn't what the jury found in the USDC. Defendant
21 virtually concedes that "Option 1" meets the non-dischargeability standard but ignores that
22 "Option 2" requires "a willful and knowing disregard of the rights or safety of another" thus easily
23 satisfying the required willful intent for a finding of non-dischargeability. Moreover, Defendants
24 reliance on the recklessness definition from *Su* is inapplicable as the standard and definition in
25 the Garza trial required more than recklessness it required a wrongful act done with an intentional
26 mindset. Defendant's argument fails on all accounts and this Court should grant Plaintiff's motion
27 for summary judgment.

28 ///

1 **III. CONCLUSION**

2 Accordingly, Plaintiff respectfully requests this Court grant Plaintiff's Motion for
3 Summary Judgment and find that Cardona acted with malice and therefore the debt is not
4 dischargeable pursuant to 11 U.S.C § 523(a)(6) and 11 U.S.C § 1328(a)(4) which discharges debts
5 "for willful and/or malicious injury by the debtor to another entity or to the property of another
6 entity."

7
8 Date: March 24, 2020

LAW OFFICE OF BARUCH C. COHEN
A Professional Law Corporation

9
10 By /s/ Baruch C. Cohen
11 BARUCH C. COHEN, ESQ.
12 *Attorneys for Plaintiff DANIEL GARZA*
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**DECLARATION OF KAVEH NAVAB IN SUPPORT OF PLAINTIFF'S REPLY TO
DEFENDANT'S OPPOSITION TO PLAINTIFFS SUPPLEMENTAL BRIEF IN
SUPPORT OF HIS MOTION FOR SUMMARY JUDGMENT**

I, Kaveh Navab, declare:

1. I am an attorney-at-law, duly licensed to practice before all State and Federal courts of the State of California, and am presently one of the representing DANIEL GARZA, the Plaintiff in the above-entitled action.

2. I am personally familiar with all the facts and events involved in this matter, and I am competent to testify to the matters stated herein.

3. Attached hereto as Exhibit "A" are additional relevant portions of June 23, 2017 trial transcript in the underlying United States District Court trial.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct, except as to those matters indicated as being based upon information and belief, and to those matters I am informed and believe them to be true.

This Declaration was executed on this 24th of March 2020, in Marina del Rey, California.

/s/ Kaveh Navab
KAVEH NAVAB, ESQ.

EXHIBIT A

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

THE HONORABLE STEPHEN V. WILSON, U.S. DISTRICT JUDGE
PRESIDING

DANIEL GARZA,)
)
Plaintiff,)
)
vs.) No. CV 16-3579-SVW
)
)
CITY OF LOS ANGELES, ET AL.,)
)
Defendants.)
_____)

REPORTER'S TRANSCRIPT OF JURY TRIAL PROCEEDINGS
LOS ANGELES, CALIFORNIA
FRIDAY, JUNE 23, 2017

DEBORAH K. GACKLE, CSR, RPR
United States Courthouse
350 W. First Street, 4th Floor
Los Angeles, California 90012
(213) 894-8913

1 (Interruption)

2 MR. DESIMONE: I apologize. I have play tickets with
3 my daughter tonight. I was just checking to see how long it
4 would take me to get there. I really apologize.

5 THE COURT: Well, have the expert here Monday morning
6 in case we have to use her.

7 MR. AMERIAN: City also has an expert on this issue.

8 THE COURT: On what issue?

9 MR. AMERIAN: The same course and scope. We'll look
10 at it and provide an opposite viewpoint.

11 THE COURT: Well, what is he going to say?

12 MR. AMERIAN: He's going to say that, in his
13 estimation, under the factors and under the circumstances, that
14 it was not within the course and scope of Officer Cardona.

15 THE COURT: Well, have him here, too, but I'm tending
16 to think that if the jury answers the question acting in
17 official capacity, I think that ends that inquiry on that issue
18 given the way the case was presented; and then we would move to
19 actual malice, and there I think I just open it up for
20 argument. That's it.

21 MR. DESIMONE: Would plaintiff be permitted to argue
22 that question as well?

23 THE COURT: Actual malice?

24 MR. DESIMONE: Yes.

25 THE COURT: Of course.

1 MR. AMERIAN: Well, Your Honor, I would object to
2 that because under the indemnity -- statutory scheme, the
3 plaintiff doesn't have standing. This is strictly between the
4 cross-claimant and the cross --

5 THE COURT: That maybe right. I think we did address
6 that in the summary judgment. I think you are right about the
7 standing question. So I don't think they would be allowed.

8 MR. AMERIAN: Just so I understand the game plan for
9 Monday, we'll put evidence of damages, evidence on course and
10 scope and malice, and then --

11 THE COURT: May be no evidence on course and scope.
12 If the jury comes back the way I believe it will on that
13 question that I pose, and then we can proceed to actual malice.

14 MS. STEGMAN: Your Honor, I have one other.

15 THE COURT: Yes.

16 MS. STEGMAN: We had subpoenaed the therapist, not as
17 an expert but as a therapist, as the percipient. She's the one
18 who wrote all the records.

19 THE COURT: What is she going to say briefly?

20 MS. STEGMAN: Well, she saw the plaintiff for 17
21 months; so she has detailed diagnosis based on specific things.

22 THE COURT: What is it that she will say? It seems
23 to me that the principal ailment that the plaintiff will be
24 arguing is this post-traumatic distress syndrome. Will she be
25 saying that he doesn't suffer from that?

C E R T I F I C A T E

I hereby certify that pursuant to Section 753,
Title 18, United States Code, the foregoing is a true and
correct transcript of the stenographically reported proceedings
held in the above-entitled matter and that the transcript page
format is in conformance with the regulations of the Judicial
Conference of the United States.

Date: September 25, 2017

/s/ _____

Deborah K. Gackle
CSR No. 7106

PROOF OF SERVICE OF DOCUMENT

I am over the age of 18 and not a party to this bankruptcy case or adversary proceeding. My business address is:

4929 Wilshire Boulevard, Suite 940, Los Angeles CA 90010

A true and correct copy of the foregoing document entitled **PLAINTIFF'S REPLY TO DEFENDANT'S OPPOSITION TO PLAINTIFFS SUPPLEMENTAL BRIEF IN SUPPORT OF HIS MOTION FOR SUMMARY JUDGMENT; DECLARATION OF KAVEH NAVAB** will be served or was served (a) on the judge in chambers in the form and manner required by LBR 5005-2(d); and (b) in the manner stated below:

1. TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (NEF): Pursuant to controlling General Orders and LBR, the foregoing document will be served by the court via NEF and hyperlink to the document. On March 24, 2020, I checked the CM/ECF docket for this bankruptcy case or adversary proceeding and determined that the following persons are on the Electronic Mail Notice List to receive NEF transmission at the email addresses stated below:

Nancy K Curry (TR)	TrusteeECFMail@gmail.com
Marcus G Tiggs (DF)	mtiggs@lawbwl.com, bribwl@gmail.com
United States Trustee (LA)	ustpreion16.la.ecf@usdoj.gov
Baruch C Cohen (PL)	bcc@BaruchCohenEsq.com, paralegal@baruchcohenesq.com

☐ Service information continued on attached page

2. SERVED BY UNITED STATES MAIL: On **March 24, 2020**, I served the following persons and/or entities at the last known addresses in this bankruptcy case or adversary proceeding by placing a true and correct copy thereof in a sealed envelope in the United States mail, first class, postage prepaid, and addressed as follows. Listing the judge here constitutes a declaration that mailing to the judge will be completed no later than 24 hours after the document is filed.

☐ Service information continued on attached page

3. SERVED BY PERSONAL DELIVERY, OVERNIGHT MAIL, FACSIMILE TRANSMISSION OR EMAIL (state method for each person or entity served): Pursuant to F.R.Civ.P. 5 and/or controlling LBR, on **March 24, 2020**, I served the following persons and/or entities by personal delivery, overnight mail service, or (for those who consented in writing to such service method), by facsimile transmission and/or email as follows. Listing the judge here constitutes a declaration that personal delivery on, or overnight mail to, the judge will be completed no later than 24 hours after the document is filed.

Hon. Julia W. Brand, Roybal Federal Bldg. & Courthouse, 255 E. Temple St, Ste 1382, Los Angeles CA 90012

☐ Service information continued on attached page

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

March 24, 2020
Date

Baruch C. Cohen
Printed Name

/s/ Baruch C. Cohen
Signature